STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH COYNE, JOYCE COYNE, JEANETTE J. DAY, WILLIAM H. DRANE, JUDY DRANE, DONALD A. ENYEDY, VICTORIA L. ENYEDY, MARK FRASER, DEBORAH FRASER, THOMAS HUBER, JANEL E. HUBER, JOSEPH E. MOONEY, CYNTHIA MOONEY, JON PUSKARICH, LAUREN PUSKARICH, RUTH W. ROANTREE, MAE VAN DEWIELE, RUSSELL MORFINO, MAMIE MORFINO, ANNA PAVLAC, ANNA STRELECK, and VERA WEST,

Plaintiffs/Counterdefendants-Appellees,

and

BRIAN DOOLEY and TAMARA DOOLEY,

Plaintiffs-Appellees,

v

RACHELLE M. DANELUK, GENEVIEVE BEGIN, LENORE LESNAU, DONALD PARTHUM, KAREN PARTHUM, DENNIS TEASDALE, and DEBBIE TEASDALE,

Defendants/Counterplaintiffs/Cross-Plaintiffs-Appellants/Cross-Appellees,

and

KAY FEDERLEIN, JOHN SCHAMANTE, SALVATORE SCHAMANTE, VITA LONGO REVOCABLE TRUST, CARMELA LAROSA, MARY VAN RIJN, GERALD L. NEAULT, and MARY C. NEAULT,

UNPUBLISHED
October 18, 2005

No. 261535
Sanilac Circuit Court
LC No. 00-027210-CH

Defendants/Counter-Plaintiffs/Cross-Defendants-Appellees,

and

DONALD L. HOULAHAN and SYLVIA HOULAHAN,[1]

Defendants/Counter-Plaintiffs/Cross-Defendants-Appellees/Cross-Appellants.

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Appellants own beachfront lots on Lake Huron in the John E. Bucsko Subdivision. They appeal as of right from the trial court judgment declaring that those parties owning back lots within the subdivision have an easement over the strip of beach along their property for recreational purposes.[2] We affirm.

I. Facts and Procedural History

This is the second time this dispute has come before our Court. The underlying facts were summarized in the previous opinion, as follows:

> "On January 26, 1950, John E. Bucsko caused to be filed a subdivision plat with the Sanilac County Register of Deeds establishing the John E. Bucsko Subdivision. The subdivision plat, by its terms, includes all property to the shore of Lake Huron. The plat contains 20 lots, 4 of which (Lots 1 through 4) front on Lake Huron. The other lots lie directly to the west of Lots 1 through 4.
>
> The subdivision plat has a number of designated private roads, and provides in its dedication that, 'The streets and alleys as shown on said plat are hereby dedicated to the use of lot owners only.'

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[1] Appellees Donald and Sylvia Houlahan filed a claim of cross-appeal, but present no independent issues for our consideration.

[2] For ease of reference, and to be consistent with the previous opinions of this Court and the trial court, we will refer to those parties owning beachfront property as "front lot owners" and those without beachfront property as "back lot owners."

> The Plaintiffs in this lawsuit and all of the back lot owners argue that historically the waterfront area has been used by all of the residents of the subdivision. They further allege that in the early 1990's restrictions were placed on the back lot owners' use of the beach and waterfront area. . . .
>
> This lawsuit was brought by the back lot owners against fellow property owners within the John E. Bucsko Subdivision whose property abuts the beach and waterfront. . . . The . . . issue presented is whether the riparian[3] rights to the waterfront belong only to the frontlotters (1 through 4) or whether these rights were conveyed to all of the lots within the subdivision by the dedication of the plat."
>
> The court ultimately granted summary disposition to plaintiffs, ruling that "the interposition of [an] intervening parcel of land between parcels 1 through 4" and the lake "eliminates any claim that Lots 1 through 4 have for the riparian rights of the waterfront area lying to the east of this subdivision." The court granted "fee title ownership of that portion of the Subdivision Plat which is composed of all property lying between the shores of Lake Huron and the eastern boundary line of Lots 1 through 4" to each owner of a lot or partial lot within the subdivision. The court issued an accompanying injunction ordering that "no structures or impediments shall be erected" on the beachfront without the consent of all owners of lots or partial lots within the subdivision.[4]

This Court held that the trial court erred in concluding that all lot owners shared ownership of the disputed beach in fee. Rather, the front lot owners owned the property in fee, while the back lot owners had an easement over the beach. This Court remanded to the trial court to determine the extent of the easement.[5] On remand, the trial court granted summary disposition in favor of the back lot owners pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), and amended its judgment accordingly. The court found that, based upon the plat map and the uncontradicted deposition testimony of Elaine Borsodi regarding Mr. Bucsko's stated intent at the time of creating the plat, the front lot owners had littoral rights, including the right to construct docks in front of their properties. The court also found that the back lot owners (along with their successors, assigns, guests, and business invitees) enjoyed perpetual easements on "the Waterfront for all manner of activities historically and traditionally consistent with use of

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[3] Although the trial court used the term "riparian," the better term is actually "littoral." The former, in the strictest sense, applies to such watercourses as rivers or streams, while the latter refers to such standing bodies as lakes or oceans. See Black's Law Dictionary (6th ed).

[4] *Coyne v Daneluk*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 242875), slip op at 2-3, quoting the November 1, 2001 opinion of the trial court.

[5] *Id.* at 7.

a beach." These activities included the use of the beach itself, not just using the beach as access to the water.

II. Legal Analysis

In this appeal, appellants challenge the trial court's determination regarding the scope of the back lot owners' easement; the extension of this easement to the paying guests of those owners; and the trial court's reliance on extrinsic evidence in making its determination. We review a trial court's determination regarding a motion for summary disposition de novo.[6] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[7] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[8] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[9] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.[10]

A. Extrinsic Evidence

First, we reject appellants' contention that the trial court improperly considered extrinsic evidence as Mr. Bucsko's intent when creating the subdivision plat could be determined from the plat itself. "[T]he intent of the grantor controls the scope of the dedication."[11] However, after a detailed examination of the plat map in the prior opinion,[12] this Court remanded for further consideration regarding the intended extent of the easement.

The trial court reviewed the deposition testimony of Ms. Borsodi regarding conversations she had with Mr. Bucsko in the early 1950s, when only a few lots had been developed in the subdivision. Mr. Bucsko informed her that the beach was dedicated to the use of all property owners. Ms. Borsodi also testified regarding the use by the back lot owners of the beach shortly after the subdivision was created. While "activity occurring after the dedication [is generally]

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[6] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[7] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[8] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[9] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[10] *Beaudrie*, *supra* at 129-130.

[11] *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 88; 662 NW2d 387 (2003).

[12] *Coyne*, *supra* at 4-5.

not helpful in determining the dedicators' intent,"[13] Mr. Bucsko's statements to prospective purchasers shortly after creating the subdivision plat and the actual use of the beach at that time are clearly relevant and useful in determining his intent. Accordingly, the trial court properly considered this evidence in determining the scope of the back lot owners' easement.[14]

B. Scope of the Easement

We also reject appellants' contention that the trial court should have restricted the easement to lake access for wading, swimming, and boating, rather than extending the easement to include use of the beach itself. In this Court's previous opinion, the panel determined that the language dedicating the streets and alleys in the plat "to the use of the lot owners only" extended, by analogy, to an easement to the back lot owners over the beach.[15] Based on this reasoning in this Court's prior opinion, appellants argue that the easement rights in the beach are equivalent to the traditional easement rights in a right-of-way or road end. We disagree.

Traditionally, a highway easement confers a right to use the fee in question for ordinary street or travel purposes only.[16] Furthermore, "[p]ublic ways which terminate at the edge of navigable waters are generally deemed to provide public access to the water."[17] It is presumed that the plattor created such roadways to give access to the water.[18] However, "[c]ases involving a way which terminates at the edge of a navigable body of water are treated differently from those involving a way which runs parallel to the shore."[19] Regarding roads running parallel to the water, the Michigan Supreme Court has held that "[u]nless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to [a public] easement. Since the owner's property is deemed to run to the water, it is riparian property."[20]

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[13] *Higgins*, *supra* at 103.

[14] Ms. Borsodi's testimony regarding Mr. Bucsko's statements is, arguably, hearsay; however, appellants have never challenged the trial court's reliance on this evidence on that basis. Even if Mr. Bucsko's statements to Ms. Borsodi were inadmissible, Ms. Borsodi's own testimony regarding the traditional and historical use of the beach by the back lot owners is highly relevant, admissible evidence sufficient to determine the scope of the easement.

[15] *Coyne*, *supra* at 5-7.

[16] See *Hall v Wantz*, 336 Mich 112, 117-118, 57 NW2d 462 (1953); *Director of Dep't of Conservation v La Duc*, 329 Mich 716, 719-720, 46 NW2d 442 (1951).

[17] *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985).

[18] *Id.* at 296.

[19] *Id.* at 295.

[20] *Id.* at 293.

The disputed property in this case is akin to a right-of-way running parallel to the water. Nothing in the record suggests that the plattor intended to restrict the back lot owners' use to mere lake access from this strip of land running parallel to the water. Although comparable to the dedication of a road, a beach obviously has distinct uses from a road. The plat's dedication of the roads for the use of the lot owners is a dedication of the roads for use as roads, and, by analogy, the use of the beach as a beach. Furthermore, the uncontradicted evidence submitted by the parties on remand reveals that the plattor intended the dedication to extend to the full range of traditional beachfront uses. Accordingly, the trial court properly determined the scope of the back lot owners' easement over the beach.

C. Use of Back Lot Owners' Tenants

Finally, appellants argue that the trial court improperly extended the easement to the use of paying guests of back lot owners. The trial court determined that the easement ran with the land and extended to the back lot owners, as well as their heirs, successors and assigns, social guests, and business invitees. Appellants do not contend that any back lot owner has attempted to provide access to the beach for commercial purposes. Rather, appellants argue that individuals renting property from back lot owners should not have the same rights to use the beach as resident owners and social guests. However, appellants have cited no authority to support this proposition and, therefore, we decline to review it.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly